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No. 85-1765

In The Supreme Court of the United States

October Term, 1986

BANKERS LIFE AND CASUALTY COMPANY

APPELLANT

VERSUS

LLOYD M. CRENSHAW

APPELLEE

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

BRIEF OF AMICI CURIAE IN SUPPORT OF LLOYD M. CRENSHAW

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12 pgs

QUESTIONS PRESENTED

Whether § 11-3-23, Mississippi's mandatory penalty statute for unsuccessful appeals, is reasonably tailored to Mississippi's legitimate purposes of discouraging frivolous appeals, providing compensation for the unsuccessful appellee and to protect the Mississippi Supreme Court from spending its time, energy and resources on appeals thoughtlessly taken.

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INTEREST OF AMICUS CURIAE

Appellant herein, challenges the constitutionality of § 11-3-23, Mississippi Code of 1972, as amended. This statute mandates that a 15% penalty be assessed against parties who unsuccessfully appeal a money judgment or decree. Because the purpose of this statute is 1) to discourage frivolous appeals, 2) to assure that cases brought to the Supreme Court are those in which bona fide, substantial claims of legal error are found, and 3) to provide a measure of compensation for the successful appellee, Amicus, believes it is important that the State of Mississippi expresses its views on the constitutionality of this statute.

MISSISSIPPI'S MANDATORY PENALTY STATUTE IS REASONABLY TAILORED TO LEGITIMATE STATE PURPOSES AND THEREFORE PASSES CONSTITUTIONAL MUSTER

It is well settled that procedural provisions to discourage patently insubstantial appeals are valid, if reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied. Lindsey v. Normet, 405 U.S. 56, 78, 92 S.Ct. 862, 876, 31 L.Ed.2d 36 (1972). Section 11-3-23, Mississippi Code of 1972, as amended, falls well within these guidelines.

Mississippi's penalty statute has been a part of Mississippi law since 1857.[1] Originally the statute called for a penalty in the amount of five percent (5%) of the underlying judgment or decree, but in 1980 the Mississippi legislature increased the penalty to fifteen percent (15%). The

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[1] Miss. Rev. Code, Ch. 63 Art 12 (1857).

penalty is mandatorily imposed on the unsuccessful appellant if the Mississippi Supreme Court unconditionally affirms a final judgment or decree which is of the type specified by the statute. The judgment or decree specified are (1) a sum of money, (2) possession of real or personal property, (3) dissolution of an injunction or other restraining process involving real or personal property, (4) the sale of property or some interest in it to satisfy a sum out of the proceeds of the sale, and (5) enforcement or establishment of a lien, charge or claim upon property or some interest in property. Wallace v. Jones, 360 So. 2d 932, 933 (Miss. 1978).

The penalty statute has no legislative history. But, because the Mississippi Supreme Court has been called on to examine the application and constitutionality of the

statute on numerous occasions, the purpose for the statute is easily ascertainable. In Walters v. Texaco Oil Co., 440 So.2d 268 (Miss. 1983), the Mississippi Supreme Court was called upon by the United States Court of Appeals for the Fifth Circuit to decide if § 11-3-23 should be enforced in the federal courts under the doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed.2d 1188 (1938). In order to answer this question, the Court was required to explore the purpose for the statute. A threefold purpose was determined.

First, the statute expresses the state's interest in discouraging frivolous appeals. Second, it expresses an interest in providing a measure of compensation for the successful appellee. Id. 274. And, third, the statute protects the Mississippi Supreme Court from being required to spend its time, energy and

resources on appeals thoughtlessly taken. Id. p. 275.

Unlike the double-bond requirement in Lindsey, the penalty statute does not bar a party from appealing. Every losing party has an automatic right of appeal. However, the penalty statute does force the appealing party to consider the merits of his case, prior to appealing it. As the Mississippi Supreme Court said in Walters:

> When deciding whether to exercise that right [to appeal], the penalty statute is there for him to consider. If he is successful on his appeal, of course, he incurs no penalty. If he loses, however, he must pay the price, a price he well knows and may easily calculate before giving his notice of appeal. p. 275.

Burlington Northern R. Co. v. Woods, 480 U.S. ___, 108 S.Ct. ___, 94 L.Ed.2d 1 (1987),

cited by appellant does not hold differently. This Court in Burlington expressly declined to reach the Fourteenth Amendment issue. This Court found that Alabama's penalty statute could not be applied in diversity cases becausethe discretionary mode of operation under F.R.Civ.P. 38, conflicts with the mandatory provisions of Alabama's penalty statute. There was no finding that the mandatory statute was unconstitutional. In fact, this Court seemed to agree that a statute which is tailored to penalize an appellant who takes a frivolous appeal and to compensate the injured appellee for the delay and added expense of defending the judgment is permitted. These are two of the purposes of Mississippi's penalty statute. Further, this Court found that the purpose for Rule 38 and the Alabama penalty statute were

"sufficiently co-extensive." Clearly, if Rule 38 is constitutional and Alabama's and Mississippi's penalty statute are "sufficiently co-extensive" with Rule 38, they too must be constitutional.

The penalty statute is also uniformly and nondiscriminatorily applied in Mississippi. This is best explained by a unanimous Mississippi Supreme Court in Wallace v. Jones, 360 So.2d 932 (Miss. 1978). Justice Suggs writing for the Court said:

> The statute does not discriminate against a class of litigants because all unsuccessful appellants, whether plaintiff or defendant, are subjected to five percent [now fifteen percent] damages where the judgment or decree appealed from permits recovery. Consequently, the statute does not discriminate within the classes established by it and permits assessment of damages only when the judgment or decree appealed from permit recovery by one

of the parties in the trial court.

CONCLUSION

For the foregoing reasons, this Court, if it reaches the merits of § 11-3-23, should find that it is constitutional.

Respectfully submitted,
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